Office Supreme Court U.
FILED
FEB 19 1906

No. [redacted]49

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

In the matter of **COSMOPOLITAN POWER COMPANY**,
Bankrupt,

STATE OF NEW JERSEY,
Appellant,

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt,
Appellee.

REPLY SUGGESTIONS ON BEHALF OF APPELLEE, PETITIONER, ON MOTION FOR LEAVE TO ASSIGN CROSS-ERROR, OR FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

HORACE KENT TENNEY,
FREDERICK D. SILBER,
Attorneys for Appellee, Petitioner.

CHAMPLIN LAW PRINTING CO.

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Appellant, in the suggestions filed in opposition to our, motion, has seen fit to make an extended excursion into the record of the case at bar. The motion before the court requires no argument on the merits of the case, but reduces itself to the following considerations:—this court has allowed an appeal to the State of New Jersey, under that section of the Bankruptcy Act which grants such an appeal as a matter of grace, upon the certificate of a justice of this court, for the sole purpose of settling a question of construction of the Bankruptcy Act throughout the United

States. It is conceded that without an appeal granted under this section, appellant would have been unable to appeal to this court, as a matter of right. This appeal is granted presumably to dispose of the entire case, but by reason of certain technical rules of practice, which prevail, appellee is prevented from showing that the Court of Appeals erroneously allowed the license fee for 1903, to appellant, and unless appellee's motion is granted, this court may consider only a portion of the case made and argued in the Circuit Court of Appeals. The claim of appellant is for priority to be accorded the license fee *for the years 1902 and 1903*, and if appellant convinces this court that priority should be allowed at all, it might result in full payment of the license fee for both years, unless an examination is had of the correctness of the action of the Court of Appeals in allowing the license fee for 1903. It is conceded further, that appellee, petitioner, was concluded by the decree of the Circuit Court of Appeals, and could not, in the first instance, obtain a certificate allowing any further appeal, because the allowance of the license fee for 1903, did not involve any question of uniform construction of the Bankruptcy Act. The fact that appellee was concluded by the decree of the Court of Appeals is the best argument for the allowance of the pending motion, and it comes with poor grace from appellant, who has perfected an appeal by the favor of the court, to oppose a motion, the granting of which will result merely in the consideration of the entire record at bar.

Clearly, there are three questions which the court should determine in considering the case at bar, in order that justice and equity may be done to both parties:

First: What amount, if anything, should be allowed appellant as a license fee for 1902?

Second: What amount, if anything, should be allowed appellant as a license fee for 1903?

Third: Should the *total* amount allowed be given priority as a tax?

If the court should give the total amount allowed below priority as a tax, without considering the rightfulness of the allowance for 1903, manifest injustice may be done the creditors of the bankrupt estate in not investigating the rightfulness of the allowance for 1903, because if that allowance was properly denied by the referee and the District Court, then appellant will receive $2500 in cash out of the bankrupt estate, for 1903, that should never be paid. It is clear that a most inequitable result might be reached if petitioner is not allowed a writ of *certiorari* so that he can assign error upon the allowance for 1903.

We feel obliged to point out to the court, the inaccuracy of the statement made on page 2 of appellant's suggestions, where it is stated that "the present motion is made nearly nine months after our motion to dismiss the appeal was denied." The record will disclose that we moved to dismiss the appeal on November 13, 1905, which motion was disposed of two weeks later. About the middle of January, 1906, we served notice of the present motion. It will thus be seen that not two months intervened between the denial of the motion to dismiss the appeal and the present motion. Counsel for appellant are clearly mistaken in the statement thus made. We do not quarrel with the principles of law argued by counsel in their suggestions, but these principles are manifestly inapplicable to the disposition of the pending motion. While it is true that appellee might not be able to obtain a writ of *certiorari* if an appeal were not now pending, the circumstances surrounding the allowance of an appeal to appellant on a certificate of a

justice of this court will largely govern, we submit, the attitude of the court upon this motion.

Shall it be said, that because appellant was defeated on a question of the construction of the Bankruptcy Act, *and thereby was able to obtain a further appeal to this court*, that appellee shall not be permitted to bring the entire case here because, forsooth, no question of construction of the Bankruptcy Act was involved in that portion of the decree of the Court of Appeals, which was adverse to appellee? A dividend upon a general claim of $2,500 might be a matter of minor importance to the creditors of the bankrupt estate, but the payment of $2,500 in full, as a tax priority, would constitute a very different question. Unless the court allows the writ of *certiorari* to petitioner, appellant, by the mere allowance of the present appeal might be enabled to procure an inequitable advantage over appellee in the possibility of obtaining a preference on the license fee of 1903, where appellee is not permitted to demonstrate that any allowance for such 1903 license fee was erroneously made.

Appellant lays stress upon the caution with which the court surrounds the allowance of a writ of *certiorari*. The necessity for a writ depends upon the peculiar facts and conditions surrounding each separate case, but where a peculiar hardship and great injustice may result and where the petitioner is concluded, as in the case at bar, by the decree of the Court of Appeals, there is every reason for allowing the writ, especially when the complete record is already filed in this court, and the effect of the allowance would be merely to permit a consideration of the whole case and not of only a part of the real issues.

Where jurisdiction is taken to give uniformity to the interpretation of the Bankruptcy Act, there should be a full

and complete presentation of the case and not a partial consideration. The question of allowing a license fee when it was not actually due and owing at the time the petition in bankruptcy is filed, has been decided differently by the different bankruptcy courts. In the case at bar, the Court of Appeals, for the Seventh Circuit held, that such a license fee would be allowed as a claim against the estate, while *in re Aultman Miller & Co.*, 12 A. B. R., p. 12, the same question was decided by the District Court for the Northern District of Ohio, and the opposite conclusion was reached. The decision of Referee Doyle in that case was subsequently affirmed by Judge Wing as appears in the 13 A. B. R. in the note on page 39.

In re Emmerman vs. *Ohio Steel & Iron Specialty Co.*, 13 A. B. R., p. 40, the same question was considered by the same referee, and District Court, and decided *against* the state claiming the tax. This striking difference of opinion upon the very question involved in the case at bar should furnish most persuasive reason for the allowance of the present motion in order that all of the vexed questions arising on the record may be settled in the same decision, and as early as possible.

Although counsel for appellant alleges the contrary, yet it will be found on examining the record in the case of *Fargo* vs. *American Oak Leather Co.*, 181 U. S., 434, that the writ of *certiorari* was allowed in that case for the express purpose of permitting the appellees to obtain the benefit of an assignment of error, where otherwise they would

have been heard only in support of the decree rendered by the Court of Appeals.

We submit that the motion should be allowed.

Respectfully submitted,

Horace Hart Harney

Frederick W. Sibley

Attorneys for Appellee, petitioner.